

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF UNITED ELECTRIC) CASE NO. C15-E-23-01
CO-OP INC.’S FORMAL COMPLAINT FOR)
VIOLATION OF CONTRACT ENTERED) ORDER RE: THE CITY OF
INTO PURSUANT TO THE IDAHO) BURLEY’S PETITION FOR
ELECTRIC STABILIZATION ACT) DECLARATORY JUDGMENT
)
)
ORDER NO. 35964

On February 22, 2023, United Electric Co-op, Inc. (“United”) filed a formal complaint (“Complaint”) with the Idaho Public Utilities Commission (“Commission”). United alleges that the City of Burley, Idaho (“Burley” or “City”), violated a series of service agreements (“Agreements”) related to the allocation of the respective electric service territory and customers by and between the City and United, which were entered into pursuant to the Idaho Electric Supplier Stabilization Act (“ESSA”), and that have been approved by order of the Commission. Specifically, United’s Complaint concerns the construction of a milk processing facility (“Facility”) that is being built by Suntado, LLC (“Suntado”). United represents that the Facility is wholly within United’s service territory.

United requests that the Commission issue an order: (1) prohibiting the City from engaging in further acts in violation of the Agreements; (2) prohibiting the City from providing electric service to the Facility; and (3) requiring the City to remove all electrical connections, facilities and/or equipment installed to serve the Facility.

On March 23, 2023, the Commission issued a Summons to Burley directing the City to file a written answer to the Complaint within twenty-one (21) days of the service date of the Summons.

Burley’s Answer

On March 29, 2023, Burley filed an answer (“Answer”) to the Complaint, and a petition for declaratory order (“Petition”). Burley specifically denies some of United’s Background and locational Factual Allegations, and generally denies all of United’s remaining Factual Allegations and all three of United’s Counts in the Complaint.

Burley requests that the Commission dismiss the Complaint in full and award it: (1) Entry of an order dismissing United Complaint; (2) Entry of an order awarding Burley its attorney fees and costs; and (3) Any further relief to which Burley may be entitled.

Burley's Petition

Burley filed its Petition pursuant to Commission Rule of Procedure 101. Burley's states that its Petition is based on Commission "Order 29281."¹

Burley requests a declaratory ruling from the Commission finding that the previous territory service agreement between the parties may be terminated by either party at any time. Burley argues that the provisions of *Idaho Code* § 61-333B would then govern the re-negotiation of a territory service agreement between the parties. Burley presents four arguments in its Petition:

1. The members who negotiated and entered the 1985 Territory Service Agreement, and the 2003 amendment are no longer members of the bodies who have the authority to negotiate and enter these Agreements.
2. No clause exists in any of the TSAs which prevents either party from terminating the TSAs to renegotiate another.
3. Despite waiving conflict, there was a flagrant conflict of interest from representation throughout the proceedings between the City of Burley and United Electric Co-op.
4. Pursuant to *Idaho Code* 61-333B, statutory methods are available for citizens to not be forced into using one service provider over another based on an agreement entered into 37 years ago.

Burley requests that the Commission enter a Declaratory Order: (1) stating that Burley and United both are entitled to terminate the 2003 Territory Service Agreement with reasonable notice to the other party; (2) stating that the provisions of *Idaho Code* § 61-333B are now meant to govern the negotiations between the parties; (3) awarding Burley attorney's fees and costs; and (4) any other relief the Commission sees fit.

United's Answer to the Petition

United primarily argues that the Commission does not have jurisdiction to grant the relief requested in Burley's Petition.

The Commission's implementation role is limited to either the approval or the rejection of service territory allocation agreements. A role this commission fulfilled when it issued Order No. 29355. That implementation role is, however, strictly limited to just the power to "approve or reject" service territory allocation agreements.

Answer to Petition at 16. United argues that the Commission is not empowered to interpret agreements for any purposes, let alone to rule that they are terminable. Answer to Petition at 20.

¹ It appears that Burley's reference to Order No. 29281 is an error. Staff believes that the correct order is Order No. 29355.

United further argues that even if the Commission were to consider the arguments in the Petition, Burley's arguments are without merit.

Order No. 35855

On July 21, 2023, the Commission issued a Notice of Petition for Declaratory Judgment and Notice of Evidentiary Hearing. Order No. 35855. In that order, the Commission found it appropriate to serve copies of the Notice of Petition on all affected utilities and provide twenty-one (21) days from the filing of the order to submit written comments in support of, or opposition to, the petition.

Comments on the Petition

The Commission received four comments on the Petition. All the comments were from Electric Service Providers, and all the comments were in opposition to the Petition. The comments generally noted that the express purpose of the ESSA is to promote harmony among and between electric suppliers, prohibit pirating of consumers of another electric supplier, discourage duplication of electrical facilities, actively supervise certain conduct of electric suppliers, and stabilize the territories and consumers served with electricity. The comments reasoned that voiding service territory agreements will have the opposite effect and will increase costs, cause uncertainty, require duplicative service lines, encourage pirating, and make long-range utility planning difficult, if not impossible.

COMMISSION FINDINGS AND DECISION

The Commission has jurisdiction to issue declaratory orders under Title 61 of the Idaho Code and the Idaho Uniform Declaratory Judgments Act of 1933, *Idaho Code* §§ 10-1201 *et seq.* A declaratory judgment “must clarify and settle the legal relations at issue, and afford leave from uncertainty and controversy which gave rise to the proceeding.” *Harris v. Cassia County*, 106 Idaho 513, 517, 681 P.2d 988 (1984). For a declaratory judgment to be rendered, there must be “an actual or justiciable controversy” that is “real and substantial,” and “definite and concrete, touching the legal relations of parties having adverse legal interests.” *Id.* at 516.

“In order for there to be a justiciable controversy there must be more than a difference or dispute of a hypothetical or abstract character. Accordingly, a litigant seeking a declaratory judgment must demonstrate that an actual controversy exists and that the requested relief will provide actual relief, not merely potential relief.” *ABC Agra, LLC v. Critical Access Grp., Inc.*, 156 Idaho 781, 784, 331 P.3d 523, 526 (2014) (internal citations and quotations omitted).

Having reviewed the Petition, the record, and the arguments of the parties, the Commission cannot find that Burley's Petition presents a justiciable controversy for which the requested relief will provide actual relief. Burley's Petition provides:

Petitioner seeks a declaratory ruling from the Commission regarding the 2003 Order entered by the Commission. Specifically, Burley respectfully asks the Commission to enter an Order that previous territory service agreement of the parties can be terminated by either party, at which point the provisions of Idaho Code §61-333B would govern the re-negotiation of a territory service agreement between the parties.

Petition at 7-8.

A. Request for a Termination Provision

1. Jurisdiction for Relief

Based upon the Petition, it appears Burley requests that the Commission retroactively modify the present Agreements between the parties to include a termination provision. As support for the Commission's authority to grant such relief, Burley argues:

An entity may petition the Commission to enter a declaratory order, and the Commission has authority to grant the same. See *Idaho Code §61-334B(3), IDAPA 31.01.01.101*. The Commission has broad authority and jurisdiction "to supervise and regulate every public utility in the state and to do all things necessary to carry out the spirit and intent of the provisions of this act." Idaho Code§ 61-501. Pursuant to Idaho Code 61-333B, mechanism exist if parties are unable to come to voluntary agreements regarding the provisions of public utilities to growing cities.

Petition at 11. Having reviewed the Petition, the Commission finds that Burley has failed to provide any argument with analysis or authority to support a claim that the Commission may modify agreements between United and Burley. While Burley cites to Idaho Code § 61-501, that section specifically relates to public utilities. Similarly, *Idaho Code § 61-334B(3)* provides only for the procedure before the Commission upon a petition by an electric supplier or consumer for an exception to the provisions of section 61-332B or 61-332C(1)(a), (b) or (c); a situation not present in this Petition.

2. Potential Relief

Even if Burley had presented sufficient argument and authority to establish that the Commission could grant the relief requested, the Commission finds that Burley has requested potential relief, not actual relief.

The basis of the Complaint is that United alleges Burley violated a series of Agreements, entered pursuant to the ESSA, related to the allocation of the respective electric service territories.

Burley requests that the Commission issue an order declaring that the Agreements “can be terminated by either party.” Petition at 7-8. Burley’s request for relief does not provide actual relief for a number of reasons including: (1) Burley would still be subject to the current Agreements until such time as, hypothetically, Burley or United elected to terminate the Agreements; (2) Burley would potentially still be subject to claims for alleged violations of the Agreements and the ESSA for the period the Agreements were in place, regardless of whether Burley elected to terminate the Agreements following a Commission order; and (3) even in the absence of the Agreements, Burley is still bound by the provisions of the ESSA.

B. Substantive Arguments

While the Commission has already determined that the Petition fails to establish jurisdiction for the requested relief, and does not request actual relief, the Commission believes it necessary to address the four arguments advanced by Burley in the Petition.

Burley’s first argument provides:

The members who negotiated and entered the 1985 Territory Service Agreement, and the 2003 amendment are no longer members of the bodies who have the authority to negotiate and enter these Agreements.

Petition at 8. Burley does not present any substantive argument, authority, or legal support for its claim. Without argument or authority to support this claim, the Commission is left with nothing to consider and finds Burley’s first argument meritless. Notably, even if the Commission were persuaded by the argument, the logical relief would be to determine that the Agreements are now void, not that the Agreements now contain a termination clause.

Burley’s second argument provides:

No clause exists in any of the TSAs which prevents either party from terminating the TSAs to renegotiate another.

Id. at 8-9. Again, Burley does not present any substantive argument, authority, or legal support for its claim. In the absence of any such argument or authority to support this claim the Commission is once again left with nothing to consider and finds Burley’s second argument meritless.

Burley’s third argument provides:

Despite waiving conflict, there was a flagrant conflict of interest from representation throughout the proceedings between the City of Burley and United Electric Co-Op.

Id. at 9. Notably, Burley’s third argument is inconsistent in its very terms. Burley states that the parties to the present Agreements waived any conflicts, but then claims that flagrant conflicts

existed and suggests, without support, that those conflicts are a reason for the Commission to act. Burley again does not present any substantive argument, authority, or legal support for its claim.

It is the Commission's understanding that conflict is a required element when parties agree to waive conflict. Further, even if the Commission agreed that conflict existed and that the parties' waiver of that conflict was ineffectual, the logical relief would be to determine that the present Agreements are void; relief that Burley has not requested. The Commission finds Burley's third argument meritless.

Burley's fourth argument provides:

Pursuant to Idaho Code 61-333B, statutory methods are available for citizens to not be forced into using one service provider over another based on an agreement entered into 37 years ago.

Id. at 10. Burley's argument misconstrues the record before the Commission. Burley contends that "[t]he Idaho legislature has contemplated an issue of two service providers not being able to reach terms for an amended service agreement." Petition at 10. However, in its Complaint, United represents that it has used its best efforts to resolve the service territory dispute. United alleges that on November 2, 2022, United tendered a Proposed Agreement to Burley that would allow Burley to serve the Facility. The Proposed Agreement explicitly provides that it does not set precedent for future encroachments by Burley into United's service territory. United represents that Burley has not responded to the Proposed Agreement.

Burley does not acknowledge United's offer of a Proposed Agreement, rather Burley contends that Idaho Code 61-333B provides a process in the event that the parties cannot agree on an amended agreement, and Burley argues that:

Once this process is undertaken, the parties must then work to come to an agreement on terms of "just compensation" for whatever business would be lost by the party who loses business. Mechanisms are clearly in place here to handle such a situation, as is the situation the parties now find themselves. The City of Burley stands prepared to negotiate this just compensation to United Electric.

Id.

It is not clear to the Commission why Burley would now stand prepared to negotiate just compensation to United when the record shows that Burley has not been prepared to negotiate with United at all as to any modifications of the current Agreements, especially when the record shows that United has offered a modification contemplating little or no compensation to resolve the very issue in dispute.

What is clear to the Commission is that Burley has failed to establish that the requested relief may be granted by the Commission, failed to request actual relief, and failed to present any substantive argument or authority to support the arguments in the Petition. For those reasons, Burley's Petition is denied.

C. Attorney Fees

Burley requests an order for attorney fees and costs. Petition at 12. Burley does not present any argument, authority, or legal support for its request. The Commission denies the request.

ORDER

IT IS HEREBY ORDERED that Burley's Petition for Declaratory Order is denied.

IT IS FURTHER ORDERED that Burley's request for Attorney Fees is denied.

IT IS FURTHER ORDERED that parties comply with Order No. 35375, issued April 21, 2022. Generally, all pleadings should be filed with the Commission electronically and will be deemed timely filed when received by the Commission Secretary. *See* Rule 14.02. Service between parties should continue to be accomplished electronically when possible. However, voluminous discovery-related documents may be filed and served on CD-ROM or a USB flash drive.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 23rd day of October 2023.



ERIC ANDERSON, PRESIDENT

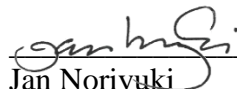


JOHN R. HAMMOND JR., COMMISSIONER



EDWARD LODGE, COMMISSIONER

ATTEST:



Jan Noriyuki
Commission Secretary

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